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No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
A. Disclosure of the photographs could reasonably be expected to intrude upon the surviving family members' privacy	2
B. Release of the photographs of Foster's body at the scene of his death would not significantly advance the general public interest in understanding governmental activity	10

TABLE OF AUTHORITIES

Cases:

Accuracy in Media, Inc. v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000)	16
Bazemore v. *Savannah Hosp.*, 155 S.E. 194 (Ga. 1930)	7
Bibles v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997)	6, 19
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979)	20
Department of Defense v. *FLRA*, 510 U.S. 487 (1994)	6, 9, 10
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)	5, 10, 11, 15, 16, 19
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976)	5, 8
Department of State v. *Ray*, 502 U.S. 164 (1991)	3, 4, 6, 11, 15
Department of State v. *Washington Post Co.*, 456 U.S. 595 (1982)	2, 6, 10
Dismukes v. *Department of the Interior*, 603 F. Supp. 760 (D.D.C. 1984)	19
EPA v. *Mink*, 410 U.S. 73 (1973)	1
Florida Bar v. *Went For It, Inc.*, 515 U.S. 618 (1995)	6

Cases—Continued: Page

Green v. *Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) 18
Hilton v. *South Carolina Pub. Ry. Comm'n*, 502 U.S. 197 (1991) 18
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 9
National Org. For Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 20
New York Times Co. v. *NASA*, 782 F. Supp. 628 (D.D.C. 1991) 6
New York Times Co. v. *New York Fire Dep't*, 754 N.Y.S.2d 517 (Sup. Ct. 2003) 7
O'Kane v. *United States Customs Serv.*, 169 F.3d 1308 (11th Cir. 1999) 17
Rose v. *Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), aff'd, 425 U.S. 352 (1976) .....
Schuyler v. *Curtis*, 42 N.E. 22 (N.Y. 1895) 7
United States v. *Armstrong*, 517 U.S. 456 (1996) 12
United States v. *Chemical Found., Inc.*, 272 U.S. 1 (1926) 12
United States v. *Nix*, 189 U.S. 199 (1903) 12

Statutes and rule:

Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 ..... 18, 19
Freedom of Information Act, 5 U.S.C. 552 *et seq.*:
5 U.S.C. 552(a) 19
5 U.S.C. 552(a)(4)(A)(ii) 19
5 U.S.C. 552(b) 19
5 U.S.C. 552(b)(6) 5
5 U.S.C. 552(b)(7)(C) ..... *passim*
Fed. R. Civ. P. 26(c) 14

Miscellaneous: Page

Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Feb. 1975) 3
Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967) 3
Department of Justice, Office of Info. & Privacy, *Freedom of Information Act Guide and Privacy Act Overview* (May 2002) 14
Robert B. Fiske, Jr., *Report of the Independent Counsel: In re Vincent W. Foster, Jr.* (June 30, 1994) 16, 18
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) 2
H.R. Rep. No. 795, 104th Cong., 2d Sess. (1996) 19
Thomas McCarthy, *The Rights of Publicity and Privacy* (2d ed. 2003) 8
Restatement (Second) of Torts (1977) 7, 9
S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 1, 14
S. Rep. No. 221, 98th Cong., 1st Sess. (1983) 2, 10
S. Rep. No. 433, 103d Cong., 2d Sess. (1995) 16
S. Rep. No. 272, 104th Cong., 2d Sess. (1996) 20
Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) 8
Webster's Third New International Dictionary (1976) 5
A. Westin, *Privacy and Freedom* (1967) 7

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In the decade since the death of Vincent Foster, there have been five official investigations into the circumstances of his death, each of which concluded, based on overwhelming evidence, that Foster committed suicide. See Gov't Br. 2-5. Thousands of pages of evidence, testimony, and analysis, and more than a hundred photographs arising from those investigations have been released, apprising the public, in minute detail, of the government's conduct, processes, operations, and activities in the course of those investigations.

Respondent Favish (respondent) and his amici interpret FOIA as commanding the disclosure of all "the raw evidence" (Resp. Br. 19) from the investigations, because the government "may or may not" (Rep. Comm. Br. 13) have misstepped. FOIA's central purpose, however, is not to maximize the disclosure of all information in the government's possession, but to permit the "fullest *responsible* disclosure," *EPA* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)) (emphasis added), of information about the operations and activities of

the government without "harm[ing]" the interests of private individuals, *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). Exemption 7(C) thus requires more than the mere articulation of insubstantial suspicions of governmental misconduct before FOIA requesters can obtain records that intrude upon the privacy of individuals. That is because, in Congress's view, "the value of an informed citizenry" should not come at the expense of "the privacy of those same citizens." S. Rep. No. 221, 98th Cong., 1st Sess. 3 (1983).

A. Disclosure Of The Photographs Could Reasonably Be Expected To Intrude Upon The Surviving Family Members' Privacy

Neither respondent nor his amici seriously dispute the emotional harm and disruption that public release of the photographs of Foster's body would cause his family members. Nor do respondent and his amici deny the lack of any established tradition of access to law-enforcement photographs and similar records of the dead and dying. Respondent and his amici nevertheless assert that the same Congress that strove to "exclu[de] those kinds of files the disclosure of which might harm the individual," H.R. Rep. No. 1497, *supra*, at 11, and to adopt "common sense" protections for the "privacy of individuals," S. Rep. No. 221, *supra*, at 21-22, categorically forbade courts to accord any consideration whatsoever to the intrusion on privacy that close family members would suffer by the public dissemination of records like the Foster death-scene photographs.

1. Respondent and his amici's cramped vision of FOIA's privacy protection has no home in Exemption 7(C)'s text. The exemption, by its plain terms, broadly protects against any and all forms of unwarranted invasions of "personal privacy" caused by the production of records. 5 U.S.C. 552(b)(7)(C). Respondent and amicus Silha Center argue (Resp. Br. 4; Silha Br. 5-6) that FOIA's privacy protection extends only to individuals "explicitly mentioned" (Silha Br. 5) in law-enforcement records. But nothing in the ordinary understanding of the phrase "personal privacy" supports that limitation. If Congress had wished to limit Exemption 7(C) in that manner, it would have written the exemption to protect "the personal privacy of the individual or individuals described in the records."

Congress did not write the exemption that way because its purpose was broader. While modern-day government needs a vast amount of personal information to function (both in law enforcement and in the administration of such programs as Medicare, Medicaid, and Social Security), access to such information generally is not needed for the public to understand and evaluate governmental operations. Congress thus wanted to ensure that, in the course of opening the government to greater scrutiny, it did not open the private lives of others to unwarranted scrutiny. See S. Rep. No. 221, *supra*, at 3 ("No one questions the value of an informed citizenry; nor should anyone question the government's obligation to respect the privacy of those same citizens.").

For that reason, the privacy exemptions have, for more than thirty years, been understood to "includ[e] members of the family of the person to whom the information pertains." *Attorney General's Mem. on the Public Info. Section of the Administrative Procedure Act* 36 (June 1967); see also *Attorney General's Mem. on the 1974 Amendments to FOIA* 9 (Feb. 1975) (Exemption 7(C) protects "person[s] mentioned in the requested file," and "*also* protects relatives or descendants of such persons") (emphasis added). This Court took the same approach in *Department of State* v. *Ray*, 502 U.S. 164 (1991), in considering the embarrassment that disclosure

of the identities of returned Haitian nationals could cause for those nationals "or their families," *id.* at 176.[1]

It is common sense—and a "common sense" conception of privacy is what Congress intended, S. Rep No. 221, *supra*, at 22—that law enforcement files and other governmental records may contain information or allegations about such matters as an individual's extramarital affairs, sterility, diseases, or sexual predilections, the disclosure of which would implicate the privacy of not just the named individual but also of his or her spouse and (reputed) children, whether they are expressly mentioned in the file or not. Indeed, respondent concedes (Br. 15) that privacy protection should extend to such "appropriate situations" as records documenting a genetic disorder or a sexually transmitted disease. Having thus acknowledged that Exemption 7(C)'s reference to "personal privacy" includes, in appropriate situations, the privacy interests of family members that are not mentioned by name in the requested record, respondent's text-based challenge to the protection of survivors' privacy interests collapses.[2]

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[1] Amicus Silha Center suggests (Br. 13) that this Court's reference in *Ray* pertained only to those select family members who were mentioned by name by a few of the returned nationals during their interviews with State Department officials. That argument ignores that the State Department broadly asserted, and this Court sustained, Exemption 6's privacy protection because of the harm that could befall *all* of the returned nationals and their families. See Eaves Decl., J.A. 43, *Department of State* v. *Ray*, No. 90-747 ("To disclose the identities of these individuals [all of the interviewed nationals] would not only betray their trust in our discretion, it would also subject them or their families to possible embarassment [sic] in their social and community relationships."). The harsh reality was that, if foreign government officials or paramilitary groups were inclined to engage in retaliatory attacks, they would hardly distinguish between those family members named in an interview and those who were not.

[2] In fact, the arguments of respondent and his amici are at war with each other. The same plain text that amicus Silha Center insists precludes the protection of *any* survivor privacy interests (Br. 5-6), respondent reads as protecting survivor privacy in "appropriate situations" (Resp. Br. 15), and amicus American Association of Physicians and Surgeons (AAPS) reads (Br. 13-14) as exempting autopsy records and photographs from disclosure as medical records. The latter argument fails because FOIA contains no general exemption for medical records. It exempts medical records only if their production "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). If, as AAPS also argues (Br. 7), all personal privacy rights die with the subject of the record and FOIA does not protect the privacy interests of survivors, then labeling autopsy photographs medical records does nothing to prevent their disclosure.

2. Unable to find a textual anchor for excluding the privacy interests of survivors from Exemption 7(C)'s aegis, respondent (Br. 10-11) and his amici (Silha Br. 8-9; American Ass'n of Physicians & Surgeons (AAPS) Br. 7-8) complain that survivors' privacy interests have an insufficient pedigree in tort law. That argument is both irrelevant and wrong.

It is irrelevant because FOIA's personal privacy protections extend beyond constitutional and tort-law conceptions of privacy to embrace personal information that is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763-764 (1989) (quoting *Webster's Third New Int'l Dictionary* 1804 (1976)). It is the "practical obscurity" of such information and its "hard-to-obtain" character, rather than the protection afforded it by the common law of tort, that creates a FOIA-protected privacy interest against its broad disclosure to the public. *Id.* at 762, 764. The "privacy values" that FOIA embodies, moreover, include protecting individuals from "embarrassment," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376-377 (1976), due to the revival of "wholly forgotten" past events, *id.* at 381, and any "retaliatory action" or even attempted

"interview[s]" by third parties that disclosure might bring about, *Ray*, 502 U.S. at 177.

Exemption 7(C)'s protection for third parties thus turns upon the fact that an "injury" or "harm" could arise "from the unnecessary disclosure of personal information," *Washington Post*, 456 U.S. at 599, rather than the particular form that the injury assumes. The desire of family members to limit or prevent public viewing of the deceased, to conduct their grieving out of the public eye, and to avoid the emotional pain and intrusion on memories of the beloved that would result from the government's dissemination of death images falls squarely within the range of privacy values recognized by this Court in earlier FOIA cases.[3]

The argument of respondent and his amici is wrong because those same interests have found solid recognition in state law. Indeed, one of the very first tort cases ever to address the right of privacy involved a survivor's claim for protection against the mental distress and upset occasioned by an unauthorized use of the deceased's image. In words that presaged the consistent holdings of courts recognizing survivor privacy under FOIA (see Gov't Br. 23-24), New York's highest court explained:

> It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.

Schuyler v. *Curtis*, 42 N.E. 22, 25 (N.Y. 1895). While the court ultimately found that the asserted injury in that case was not reasonable and thus not actionable, *id.* at 26, the court stressed that a survivor's "privacy" would be violated by actions "such as might be regarded by reasonable and healthy minds" as causing "injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts," *id.* at 27.

Numerous other jurisdictions followed suit both as a matter of state tort law and state statutory protection.[4] The Restatement of Torts likewise recognizes that publication of a photograph of a deceased infant—a hypothetical "child with two heads"—over the objection of the mother results in an invasion of the mother's privacy, at least where the connection between the mother and the child is made apparent to the public. Restatement (Second) of Torts § 652D, at 387 (1977). The unreasonableness of publicity given to

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[3] Indeed, in *Department of Defense* v. *FLRA*, 510 U.S. 487 (1994), and *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam), the Court held that FOIA's privacy protection encompasses the disruption in individuals' daily lives that would be caused by unwanted solicitations if their home addresses were released. That protection from disruption and intrusion is very much akin to the "disruption of * * * peace of mind" that forms the core of survivors' privacy interests. *New York Times Co.* v. *NASA*, 782 F. Supp. 628, 632 (D.D.C. 1991). See also *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624 (1995) (acknowledging the State's "substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact").

[4] See Gov't Br. 24-27 & n14; *New York Times Co.* v. *City of New York Fire Dep't*, 754 N.Y.S.2d 517, 523 (Sup. Ct. 2003) (911 tapes and transcripts of World Trade Center victims' "calls for help in extremis should be protected as private utterances for the sake of both the victims who died, and their surviving family members"); *Bazemore* v. *Savannah Hosp.*, 155 S.E. 194 (Ga. 1930) (recognizing parents' privacy interest in photographs of deceased child's body); see also A. Westin, *Privacy and Freedom* 36 (1967) ("[E]motional release through privacy plays an important part in individual life at times of loss, shock, or sorrow.").

private matters, the Restatement explains, must take into account "the customs and conventions of the community." *Id.* at 391. As explained in the government's opening brief (at 26-28), this Nation's customs and habits have traditionally denied public access to autopsy or crime-scene photographs and similar depictions of individuals immediately prior to or in the throes of their death, and have afforded family members control over the body and image of the deceased, respecting the privacy of their funereal decisions, grieving process, and memories of the departed.

Respondent argues (Br. 4, 10) that recognition of privacy rights in survivors is somehow illegitimate because the injury that the privacy right addresses can be described as "emotional distress." And so it can. But that is no different from the type of emotional injuries that triggered protection under FOIA's privacy exemptions in *Ray* and *Rose*. *Ray*, 502 U.S. at 176 (protection against "embarrassment in their social and community relationships"); *Rose*, 425 U.S. at 377 ("embarrassment, perhaps disgrace"); see also *Rose* v. *Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) ("[A] person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information."), aff'd, 425 U.S. 352 (1976). What respondent's argument fails to appreciate is that the invasion of privacy tort was conceived to protect against emotional harms, rather than harm to physical or property interests. See, *e.g.*, S. Warren & L. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890) (urging protection against "mental pain and distress"); *id.* at 205 (protection of "thoughts, sentiments, and emotions"). Indeed, privacy often is distinguished from other torts precisely because it protects "against mental distress that accompanies undesired publicity," rather than pecuniary or proprietary interests. J.T. McCarthy, *The Rights of Publicity and Privacy* § 5:61, at 5-112 (2d ed. 2003) (internal quotation marks omitted); see also

Restatement, *supra*, § 652C, at 381 ("[T]he protection of [an individual's] personal feelings against mental distress is an important factor leading to a recognition of the [privacy] rule.").

Amicus Silha Center objects on policy grounds to Exemption 7(C)'s inclusion of survivors' privacy interests, arguing (Br. 11) that it would "erect an even higher barrier for requesters" than that established by *Reporters Committee*. But the question is not whether survivors' privacy should get special recognition; it is whether that interest will receive any recognition at all under Exemption 7(C), an exemption that Congress "intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Contrary to Silha Center's argument (Br. 22), the fact that the privacy interest exists does not mean that it will control and lead to "unjustified withholding." It means only that the traditional balancing of interests under *Reporters Committee* takes place before law enforcement photographs and recordings of the dead and dying may be released to the public.[5]

In short, the right of survivors to privacy, which has been broadly recognized under FOIA (see Gov't Br. 22-24 & n.12), has much deeper roots in tort law, and at least equivalent (if not deeper) roots in statutory protection, than the rap sheets this Court held to be protected against disclosure in *Reporters Committee*, the Air Force honor hearing summaries protected in *Rose*, the home addresses protected in *Department of Defense* v. *FLRA*, 510 U.S. 487 (1994), and the

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[5] Silha Center's concern (Br. 22-24) that survivor privacy interests will impose an undue burden on the government is misplaced. The Executive Branch has protected survivors' privacy interests under FOIA for decades without encountering such burdens, largely because the amount of information in government hands and the circumstances surrounding its collection make the identification of survivors relatively straightforward in practice.

information about "place of birth, date of birth, date of marriage, employment history, and comparable data" that this Court held protected under FOIA's privacy exemptions in *Washington Post*, 456 U.S. at 600. The court of appeals' recognition (Pet. App. 13a) that Foster's survivors have interests protected under Exemption 7(C) thus tracks this Court's settled FOIA jurisprudence. Tellingly, Congress—which has not hesitated in the past to amend FOIA in response to judicial decisions and which already has amended Exemption 7 twice—has never seen fit to amend the law to overturn that widespread appellate precedent. By contrast, respondent and his amici, in urging this Court to reject survivor privacy interests that are already protected by state tort law, state statutory law, and established custom and practice, press the very type of "overly literal interpretation" of the privacy exemption that Congress eschewed as ill-equipped to protect private individuals from harm through FOIA disclosures. S. Rep. No. 221, *supra*, at 22.

B. Release Of The Photographs Of Foster's Body At The Scene Of His Death Would Not Significantly Advance The General Public Interest In Understanding Governmental Activity

Under Exemption 7(C), the family's privacy interest must be weighed against the public interest in disclosure of the documents to determine whether invasion of that privacy interest would be warranted. *Reporters Committee*, 489 U.S. at 762. The "only relevant public interest," *Department of Defense* v. *FLRA*, 510 U.S. at 497, to be weighed is the extent to which disclosure of the requested documents would "contribute *significantly* to public understanding of the operations or activities of the government," *Reporters Committee*, 489 U.S. at 775 (emphasis added). Respondent has failed to establish the existence of any such public interest.

1. Respondent has asserted a public interest in uncovering deficiencies or "misfeasance" in the Independent Counsel investigations into Foster's death. Pet. App. 10a-11a, 58a. In particular, respondent contends (Br. 19) that the government investigations were "deceptive and untrustworthy," making it "necessary for the public to see the raw evidence."

That contention cannot be reconciled with this Court's decision in *Ray*. In that case, a FOIA requester sought unredacted interview reports of returned Haitian nationals, in part to verify whether the government's conclusion that the returned nationals were not being subjected to retaliation was accurate. In the absence of record evidence "impugn[ing] the integrity of the reports," however, this Court was "unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports." 502 U.S. at 179. The Court reasoned that, "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Ibid.* See also *Reporters Committee*, 489 U.S. at 774 (allegations that a reputed organized crime figure "had improper dealings with a corrupt Congressman" were insufficient to overcome the privacy interest in a rap sheet).

While amicus Reporters Committee argues (Br. 14-15) that allegations of corruption alone should suffice because of the public interest in exposing governmental misconduct, *Ray* makes clear that FOIA does not override the presumption of regularity that attaches to the actions of government officials, including the five investigations into Foster's death. See 502 U.S. at 179 ("We generally accord Government records and official conduct a presumption of legitimacy."). Accordingly, when a FOIA request seeks private informa-

tion about third parties based on asserted governmental misconduct, there must be clear evidence of that misconduct to overcome the presumption of regularity, in the form of new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance. See Gov't Br. 37-38.

Respondent and his amici are quick to criticize that test, but they are unable to identify any alternative standard, leaving this Court only the Ninth Circuit's hollow inquiry into whether the FOIA requester has articulated suspicions that "if believed, would justify his doubts" (Pet. App. 11a)—which, by definition, they always will. In any event, their criticisms of the clear evidence standard miss the mark.

First, Reporters Committee errs in arguing (Br. 11) that the "clear evidence" standard is "made * * * up out of whole cloth." It is drawn directly from longstanding precedent of this Court establishing the type of showing needed to overcome the presumption of regularity. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *United States* v. *Nix*, 189 U.S. 199, 206 (1903).

Second, in applying the clear evidence standard in the FOIA context, Reporters Committee finds the requirement that the FOIA requester identify new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance to be too stringent. But Reporters Committee offers no explanation for why allegations of missteps or misconduct that have been repeatedly refuted should be sufficient to overcome the privacy interests of third parties. Amicus AAPS argues (Br. 3) that they should because any time the government addresses and answers such allegations, it may engage in self-exoneration. Putting aside the district court's finding that each independent inquiry into Foster's death was, in fact, focused on identifying any error in the government's initial investigation, see Gov't Br. 36,

the presumption of regularity cannot be overcome simply by piling on such additional speculation about possible irregularity.

Nor do amici explain why a FOIA requester's allegations of governmental misconduct need not be "credible" or "objectively reasonable." This Court ruled in *Ray* that subjective curiosity about the veracity of the government's reports was insufficient. Beyond that, it is difficult to understand why, as Reporters Committee contends (Br. 15), "obvious [c]onsiderations of fairness" dictate that *incredible* or *unreasonable* allegations of governmental misconduct should suffice to overcome third-parties' privacy interests. Certainly considerations of fairness for those third parties whose privacy is at stake do not.

Amici's objections reduce to no more than an aversion to having to show anything beyond the assertion or speculation of wrongdoing to justify the invasion of personal privacy that disclosure would entail. Reporters Committee fears (Br. 15) that requiring any additional showing will deter FOIA requests where "the only material that would yield credible evidence of government misconduct is precisely the material that has been requested." But if there is no evidence of governmental misconduct, then the mere hypothesis that a record might reveal it is insufficient. That is the holding of *Ray*. Reporters Committee's core objection is not to the government's reading of FOIA; it is a disagreement with the presumption of regularity itself.

Beyond that, the requirement of clear evidence does not apply to all FOIA requests. It applies only to those FOIA requests that seek the disclosure of records implicating the personal privacy of third parties. In addition, Reporters Committee's argument overlooks that the agency has an independent obligation to identify and balance any relevant public interest in deciding whether to invoke Exemption 7(C). Accordingly, where the government's files themselves

contain clear evidence of governmental wrongdoing, no separate showing by the requester will be required.[6]

In those cases where disclosure could reasonably be expected to intrude on personal privacy, there is no such evidence of governmental misconduct, and no other public interest is identified, Exemption 7(C) provides for withholding if the invasion of privacy would be "unwarranted." The whole point of that balancing of interests under Exemption 7(C) is to require some showing to establish that the invasion of privacy is warranted. A balance that requires nothing of meaningful weight on the other side is no balance at all—it is "effectively an irrebuttable presumption" (Rep. Comm. Br. 14) in favor of invading the privacy of third parties. See S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (privacy interests should be balanced against, not "substantially subordinated" to, the interest in disclosure).[7]

Third, Reporters Committee argues (Br. 13) that mere allegations (or already refuted, incredible, or unreasonable ones) should suffice simply because disclosure of the records "may or may not" reveal a "government coverup" or "an official's abuse of his position." The latter point may be true, but only because it is tautological: every request for

[6] See, *e.g.*, Department of Justice, Office of Info. & Privacy, *Freedom of Information Act Guide and Privacy Act Overview* 352-353 (May 2002) (discussing policy for disclosing the results of investigations by the Office of Professional Responsibility where those investigations uncover "intentional or knowing professional misconduct").

[7] For that reason, Reporters Committee's contention (Br. 13) that FOIA requesters should not have to show more to overcome the presumption of regularity than is necessary to obtain discovery in civil litigation fails. Application of Exemption 7(C)'s balancing test is not some preliminary stage in FOIA litigation; it resolves the merits of the case and the individual's entitlement to privacy. Furthermore, courts have the authority to fashion protective orders to prevent unwarranted intrusions on privacy in the course of civil discovery. Fed. R. Civ. P. 26(c). FOIA disclosures cannot be limited; they must be made to the public at large.

documents "may or may not" confirm the government's own description of its activities. Thus, respondent's argument (Br. 18) that the photographs at issue here should be released because they will be either "consistent" or "inconsistent" with the five unanimous investigatory findings of suicide reduces the required showing of a public interest in disclosure to a pleading requirement.

Fourth, respondent and Reporters Committee contend that the public is entitled to "see the raw evidence" in a law enforcement investigation (Resp. Br. 19), because in their view, "the purpose of the FOIA is to allow the public to see for itself what underlies the government's pronouncements" (Rep. Comm. Br. 14). The purpose of FOIA, however, is to allow the public to "*understand*[] * * * the operations or activities of the government," not to duplicate them. *Reporters Committee*, 489 U.S. at 775 (emphasis added). FOIA does not deputize requesters as independent counsels entitled to undertake their own shadow investigations of any law-enforcement operation that interests them. The thousands of pages of reports, witness testimony, evidence, and analysis, and more than one hundred photographs that have already been released to the public in conjunction with the inquiries into Foster's death, have provided the public detailed insight into the operations and activities of investigators in the Executive and Legislative Branches, as well as two Independent Counsel. The fact that respondent is not persuaded by the unanimous conclusions of those investigations is beside the point. FOIA's purpose is to promote an informed citizenry, not to achieve universal agreement.[8]

[8] For the reasons outlined in the government's opening brief (at 36-37 nn.21-22), respondent's list of his disagreements with the Independent Counsel investigations does not satisfy the clear evidence standard. Respondent's attempt to find fault in who attended the beginning of the autopsy (Br. 28-29) is meaningless given the repeated and consistent analyses and endorsements of the autopsy's substantive procedures and

2. As explained in the government's opening brief (at 41-44), the court of appeals deemed irrelevant to the public interest prong of the Exemption 7(C) balance the amount of information already released to the public. Pet. App. 11a. That aspect of its holding cannot be reconciled with this Court's decision in *Ray*, which specifically sustained a withholding on privacy grounds in part because the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178. Respondent and his amici do not seriously contend otherwise. Reporters Committee instead raises the specter (Br. 21) of diversionary releases by the government of "large quantities of relevant (or even not particularly relevant) information while holding back the most embarrassing or damaging material." That argument is without merit. In the first place, the release of "large quantities of *relevant* * * * information" is precisely what this Court held in *Ray* is pertinent to the Exemption 7(C) analysis.

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conclusions. See Starr Report, J.A. 128-134; Robert B. Fiske, Jr., *Report of the Independent Counsel: In re Vincent W. Foster, Jr.* 37 (June 30, 1994) (*Fiske Report*); S. Rep. No. 433, 103d Cong., 2d Sess. 26-29 (1995). In any event, any departure from protocol by the *Virginia* Medical Examiner would not constitute clear evidence of misconduct by the *federal* government. See *Reporters Committee*, 489 U.S. at 774. For those same reasons, respondent's comments (Br. 27-28, 34-37) about the report filed by an employee of the Virginia Medical Examiner's office (the Haut Report) are unavailing. See also *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120, 124 (D.C. Cir. 1999) (finding respondent's contentions about the Haut Report to be "considerably below the threshold" needed to suggest that "any government actor has behaved illegally"), cert. denied, 529 U.S. 1111 (2000). Respondent's concerns about the identification of Foster's car (Br. 29-31) and autopsy X-rays (Br. 37-40) have all been thoroughly probed. See Starr Report, J.A. 175-176 (explaining absence of X-rays and the lack of need for them); J.A. 187-189 (explaining identification of Foster's car at Fort Marcy Park and addressing variations in witness accounts); *Fiske Report* 29-36 (similar); S. Rep. No. 433, *supra*, at 28 & n.98 (addressing lack of X-rays).

Second, Reporters Committee offers no basis for its suggestion that the government has ever engaged in the sort of disclosure machinations and "evasional document release[s]" (Rep. Comm. Br. 23) that it hypothesizes, and it would be contrary to the presumption of regularity to fashion a rule of law on the premise that the government might do so. Certainly the present case provides no foundation for that claim. It blinks reality to suggest that the thousands of pages of records and materials already released devoted specifically to the cause of Foster's death and the reliability of the government's investigations into it are "only tangentially relevant" (*ibid.*) to the public's interest in those very same subjects. Furthermore, FOIA's provisions for de novo judicial review of exemption claims, the requirement of *Vaughn* indices, and the availability of *in camera* review have ensured for decades that withholdings are limited to legitimately protected material.

Finally, there is no merit to Reporters Committee's contention (Br. 21) that the more material the government releases and the more thoroughly the government probes a matter, the greater the need for total and complete disclosure because "something further [may] remain[] to be ferreted out." That proposed construction of FOIA, a statute designed to promote responsible openness in government, would create perverse incentives by making an inability to protect the legitimate privacy interests of individuals the price of forthcoming and comprehensive disclosures.

3. The government's opening brief (at 46-49) also explains that the disclosure ordered by the Ninth Circuit was improper because photographs of Foster's right shoulder, arm, and torso bear no nexus to the (already refuted) assertions respondent makes about the Independent Counsel investigations. They can shed no light on respondent's litany of complaints about the gun identification procedures employed by law enforcement investigators (Resp. Br. 21- 27),

the contents of the Haut Report (*id.* at 27-28, 34-37), attendees at the autopsy (*id.* at 28-29), Foster's car in the Fort Marcy parking lot (*id.* at 29-31), the credibility of one of Independent Counsel Starr's experts (*id.* at 31-32), an FBI memo about the exit wound (*id.* at 32-34), or the absence of autopsy X- rays (*id.* at 37-40).

Beyond those complaints, respondent asserts (Br. 40) only that one photograph might establish why the gun remained in Foster's hand. But the investigations already explain that. Starr Report, J.A. 141-143 (gun shot residue and indentations on thumb both prove that Foster fired the gun and explain why the gun remained in his hand), *Fiske Report* 34, 50 (same). And respondent's perceived "mystery about the blood flow patterns" (Br. 46) is no mystery to trained experts. See Starr Report, J.A. 162-168.

4. Unable to prevail within the framework of this Court's precedent, Reporters Committee argues that this Court should overrule the holding in *Reporters Committee* that the public interest side of the Exemption 7(C) balance focuses on the extent to which the requested materials shed light on the operations or activities of the government. In doing so, Reporters Committee relies on a general statement about the purpose of FOIA in the 1996 Electronic Freedom of Information Act, which reconfirms the "right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose." Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048.

Principles of *stare decisis* are "most compelling" when the Court confronts "a pure question of statutory construction." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 205 (1991). Reporters Committee thus bears a heavy burden "of showing that the legislature intended such a change," *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989), which it has not met.

First, the 1996 statement of congressional purpose neither amends nor addresses Exemption 7(C). The cited statement merely reaffirms the long-established proposition that the propriety of a FOIA request, in the first instance, does not turn upon the "purposes for which the request for information is made" or the identity of the requester—a proposition established by the very decision that amicus insists Congress intended to overrule. *Reporters Committee*, 489 U.S. at 771. The text of the 1996 congressional statement, moreover, makes clear that it is speaking to that general rule, which itself remains "subject to statutory exemptions," Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048, rather than to the operation of the exemptions themselves.[9]

Second, with respect to the FOIA generally, and the 1996 amendments in particular, Congress knows how to express its dissatisfaction with judicial constructions of the FOIA when it wants to, and when it does, it does not do so elliptically. See, *e.g.*, H.R. Rep. No. 795, 104th Cong., 2d Sess. 21 (1996) (stating that this section "would overrule *Dismukes* v. *Department of the Interior*, [603 F. Supp. 760, 763 (D.D.C. 1984)]."

Third, this Court has continued to apply the *Reporters Committee* standard after the 1996 amendments. See *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam). See also *O'Kane* v. *United States Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (rejecting the precise argument advanced by Reporters Committee here). In

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[9] In fact, the same Congress that crafted the Exemption 7(C) provision at issue in *Reporters Committee* also laid a statutory foundation for that decision's identification of the relevant public interest under Exemption 7(C). See 5 U.S.C. 552(a)(4)(A)(iii) (in fee provision, "disclosure of the information is in the public interest [if] it is likely to contribute significantly to public understanding of the operations or activities of the government"). Reporters Committee's argument thus requires the conclusion that "public interest" means one thing in subsection (a) of FOIA and a different thing in subsection (b).

short, "the quoted statement of congressional findings is a rather thin reed upon which to base" an overruling of fourteen-year-old precedent, where Congress's intent to change the law is "neither expressed nor, we think, fairly implied in the operative sections of the Act." *National Org. For Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994).

Reporters Committee also invokes (Br. 25) the "additional views" in the Senate Report of Senator Leahy, who criticized *Reporters Committee*. But those views were just that—the additional views of a single Senator, to which no one else subscribed. Reporters Committee stresses (Br. 25) that Senator Leahy was "the sponsor" of the 1996 amendments. In reality, he was but one of several sponsors of the legislation. See, *e.g.*, S. Rep. No. 272, 104th Cong., 2d Sess. 5-6 (1996). The fact that none of those other sponsors (or any other Senator, for that matter) expressed agreement with Senator Leahy's views thus says as much, if not more, than Senator Leahy's lone comments. In any event, the "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), much less in overturning settled precedent of this Court.

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For the foregoing reasons, and for those stated in our opening brief, that portion of the judgment of the court of appeals ordering the release of four photographs should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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